In the

Supreme Court of the United States.

October Term, 1904.

P. L. FLANIGAN
vs.
THE COUNTY OF SIERRA,

No. 121

PETITION FOR RE-HEARING.

The County of Sierra, the defendant in error, now presents its petition for a re-hearing herein and states the grounds thereof as follows:

First: That the California cases cited do not support that portion of the opinion which holds that the Ordinance in question here is a revenue measure.

a. The clear effect of such holding is that in all cases in California where a license tax is fixed upon the business of raising, grazing, herding or pasturing sheep that, *as matter of law,* the Ordinance fixing the license is a revenue measure, regardless of what extra expense the business may entail upon the county, and notwithstanding the fact that the expense is one which cannot be provided for in advance without a knowledge in advance of the number of persons who may

engage in the business, and if an attempt is made to provide for it in advance by the ordinary tax levy and no person does business in the county, there will be a surplus of funds, and if no provision is made and sheep are grazed, there is a deficiency; an expenditure which if provided for by the ordinary tax levy, puts an unjust burden upon the citizens of a county in cases like the one at bar, where the person doing business in the county pays all of his property taxes in the State of Nevada, the effect being that the citizens of the county are burdened with the cost of the protection of a business, the owners of which contribute nothing to the cost of the protection they receive.

With all due deference to the Court, it is contended that each case must be judged by its own facts, and an ordinance fixing a license tax upon a business which is the subject of regulation is a police measure or a revenue measure, according as the money raised by the license tax fixed is needed to pay the extra cost of government made necessary by that business, or to pay the ordinary and general expenses of the county government.

The Legislature of this State has said in effect (and such was the law at the time of the passage of the ordinance at bar) that counties may license the business of raising, grazing, herding and pasturing sheep, and fix the rate of license tax upon the same

for purposes of regulation, and if at a trial the county can show that the amount of the license tax fixed for the transaction of that business in the county is reasonably necessary for the purpose of paying the costs of regulating the business, the ordinance levying the tax would certainly be valid.

b. 72 Cal. 387 (*Lassen County vs. Cone*) was decided after a trial on the merits, at which trial it was shown and found by the Court that defendant owned a large quantity of land in the county upon which he grazed his sheep.

That another reason for characterizing the ordinance in that case as a revenue measure was the fact that the board which passed it seemed to consider the license tax levied as interchangeable and similar to the property tax levied for purposes of revenue. (p. 388.)

73 Cal. 365 (*Ex parte Mirande*) is authority *in favor* of the position that the license was imposed for purposes of regulation, as appears from the following language quoted from the Opinion:

"We do not deem it necessary to discuss the ques-
" tion as to whether the license in question is imposed
" for revenue purposes, or for purposes of regulation,
" for the reason that the board possessed authority to
" impose it for either, or both."

119 Cal. 119 (*County of Inyo vs. Erro.*) In this case the question is not touched.

Town of Santa Monica vs. Guttinger, 137 Cal. 658. In this case the ordinance on its face recited that it was for the purpose of revenue as well as regulation.

City of Sonora vs. Curtin, 137 Cal. 583. In this case an attempt was made to levy a license tax upon the business of practicing law, which business the Court holds cannot be subject to any police regulation whatever, which does not fall within the power of taxation for revenue, *for the reason that the business is not dangerous to the public, either directly or indirectly.*

These two cases are easily distinguished from the case at bar.

"An opinion in a particular case founded on its "special circumstances is not applicable to cases "under circumstances essentially different." (Mr. Chief Justice Marshall) *Brooks vs. Marbury*, XI Wheat. 91.

"The language of a decision must be considered in "the light of the circumstances involved in the case "before the Court."

Coburn vs. Brooks, 78 Cal. 446.

In conclusion on this point it may be pertinent to state that this is the first time that the distinction between the power to levy a license tax for purposes of regulation, and for purposes of revenue, as concerns the amount of the tax, in a case where the business is clearly a proper subject for regulation, has been seriously considered. The necessity for it did not arise until the repeal of the power to license for revenue.

Second: In support of the Opinion of the Circuit Court of Appeals, counsel neglected to call the attention of this Court to the case of *San Luis Obispo vs. Hendricks*, 71 Cal. 243, decided by the Supreme Court of California in Bank.

Discussing the license tax of the same nature as at bar, the Court say:

"The license tax sought to be recovered in this "action is not a penalty, but in the nature of a *debt* "due from the defendant to the county, or what is "the same thing for present purposes, a duty devolved "upon the defendant personally, which can be en- "forced precisely as though he had contracted with "the county to pay such sum of money." (p. 245.)

That the license tax sought to be recovered here is in the nature of a debt—a duty to pay—is the reason for the judgment of the Circuit Court of Appeals. This point does not seem to be considered by the Court in *Sonora vs. Curtin*. At any rate there is no indication in the Opinion that the cases, controlling the judgment of the Circuit Court of Appeals were cited.

A question decided without argument remains still an open question.

(Per Baldwin, J.) *Decatur vs. Paulding*, 14 Pet. 607.

In the premises it is respectfully submitted that a re-hearing be granted.

FRANK R. WEHE,
Attorney for Petitioner.

I hereby certify that the above and foregoing petition for a re-hearing in my judgment is well founded and is not interposed for delay.

Frank R. Wehe